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No. 84-1795

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

TECHNOGRAPH, INC.,
Petitioner,

v.

GENERAL MOTORS CORPORATION,
Respondent.

GENERAL MOTORS' BRIEF IN OPPOSITION TO TECHNOGRAPH'S PETITION FOR CERTIORARI

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CONTENTS

	Page
TABLE OF AUTHORITIES	ii
STATUTES INVOLVED	1
COUNTERSTATEMENT OF THE CASE	2
SUMMARY OF ARGUMENT	8
I. QUESTION PRESENTED NO. 1, THE DAMAGES AMOUNT OF THE 1981 FINAL JUDGMENT	9
II. QUESTION PRESENTED NO. 2, INTEREST COMPOUNDING UNDER OLD 28 U.S.C. 1961	13
CONCLUSION	17

TABLE OF AUTHORITIES

	Page
Brooklyn Bank v. *O'Neil,* 324 U.S. 697, 715 (1945) ...	15
Cherokee Nation v. *United States,* 170 U.S. 476, 490 (1925)	15
Dorey v. *Dorey,* 609 F(2d) 1128 (5th Cir., 1980)	16
Federal Trade Commission v. *Minneapolis-Honeywell,* 344 U.S. 206 (1952)	10
Hathorn v. *Lovorn,* 457 U.S. 255, 262 (1982)	11
Hughes Tool Co. v. *Trans World Airlines, Inc.,* 409 U.S. 363 (1973)	11
National Bank v. *Mechanics National Bank,* 94 U.S. 437 (1867)	16
Pack and Process, Inc. v. *Nabisco, Inc.,* C.A. No. 78-285, Slip Op. at 6-7 (D.Del., 1981)	15
Papendick v. *Robert Bosch,* 562-CA-1977, slip op. (Del. Super. Ct., Aug. 4, 1981), aff'd No. 238, 1981 (Del., March 11, 1982)	15
Rude v. *Wescott,* 130 U.S. 152, 167 (1889)	4
Stewart v. *Barnes,* 153 U.S. 465 (1893)	16
Stickle v. *Heublein, Inc.,* 716 F.2d 1550, 1561 (CAFC, 1983)	12
Toledo Scale Co. v. *Computing Scale Co.,* 261 U.S. 399 (1923)	11

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STATUTES INVOLVED

35 U.S.C. 284

Damages

Upon finding for the claimant the court shall award the claimant damages adequate to compensate for the infringement but in no event less than a reasonable royalty for the use made of the invention by the infringer, together with interest and costs as fixed by the court.

28 USC 1961 Prior to Amendment Effective October 1, 1982

"Interest shall be allowed on any money judgment in a civil case recovered in a district court. * * * Such

interest shall be calculated from the date of entry of the judgment, at the rate allowed by State law."

(June 15, 1948, c. 646, 62 Stat. 957)

28 USC 1961 After Amendment Effective October 1, 1982

(a) Interest shall be allowed on any money judgment in a civil case recovered in a district court. * * * Such interest shall be calculated from the date of entry of the judgment, at a rate equal to the coupon issue yield equivalent (as determined by the Secretary of the Treasury) of the average accepted auction price for the last auction of fifty-two week United States Treasury bills settled immediately prior to the date of the judgment. * * *

(b) Interest shall be computed daily to the date of payment except as provided in section 2516(b) of title 28, United States Code * * *, and shall be compounded annually.

* * *

(as amended April 1, 1982, Pub. L. 97-164, Title III, Sec. 302(a), 96 Stat. 55)

COUNTERSTATEMENT OF THE CASE

This case involves a patent to a process of cold forming steel products. The complaint was filed in 1956. On June 29, 1962, the District Court in Chicago found the patent invalid and entered judgment for Respondent General Motors Corp. ("GM"). 243a.[1] The Court of Appeals for the Seventh Circuit reversed the

[1] Citations are to the pages in the Appendix to the Petition unless otherwise indicated.

finding of invalidity and remanded the case on July 12, 1963 for trial of the infringement issue. Idem., cert. den. 375 U.S. 971 (1964). The case was then transferred on Petitioner's motion to the District of Delaware. On January 13, 1971, after trial, that court ruled that there had been no infringement. Idem. The Court of Appeals for the Third Circuit reversed and entered its judgment of infringement on September 16, 1972. Idem., cert. den. 411 U.S. 973 (1973).

The case was then assigned to a Special Master for an accounting of damages. 243a. Almost two years before trial an issue arose on discovery of whether "savings and gains" of cold forming parts as compared to machining or forging could form a basis for determining reasonable royalties. The Special Master then warned Petitioner of the risk of exclusive reliance on such "savings and gains." His confirmation of the October 1976 pretrial conference states that ". . . I cautioned plaintiffs of the risk of putting all their eggs in a single theory-of-damages basket. . . ."

The subsequent accounting trial consumed 53 days and involved extensive proofs on 61 separate accused processes. The report of the special master, dated February 7, 1980, occupies 127 printed pages. 50a to 187a. Taking up the accused processes one by one, he found as the fact that many did not infringe and that some did infringe. He entered fact findings rejecting Petitioner's contention that non-bumpers could not have been cold formed without the patent process. 108a-111a. He specifically found with respect to non-bumper parts that "the Henricks (patent) process had relatively slight importance to defendant" 132a. Further, "plaintiffs have offered no evidence on which a royalty might be

reasonably based." 137a. Citing settled law, including this Court's holding in *Rude* v. *Wescott,* 130 U.S. 152, 167, he held that proof must "be based upon creditable data, not speculation, conjecture or unwarranted assumptions". 136a.

The District Court carefully considered Petitioner's exceptions to the report of the Special Master. His opinion, dated August 22, 1980, confirmed the Master's report on non-bumper infringing processes because—

> "Devex's [Petitioner's predecessor] proposed basis for comparison then is unacceptable. Devex failed both to suggest and to offer proof regarding any other means to calculate the reasonable royalties to which it was entitled, and the Master properly found that it should receive nothing." 192a.

Paragraph 2(b) of the District Court's final judgment of October 6, 1980 reads:

> "(b) The Special Master's findings that plaintiffs had failed to prove the level of damages to which they were entitled for defendant's infringement in the manufacture of non-bumper parts, and that the infringing process was of 'relatively slight importance' to defendant in such manufacture, are hereby adopted". 198a.

Paragraph 5 reads:

> "5. Defendant General Motors Corporation shall pay to Plaintiffs:
>
> "(i) $8,813,945.50 plus prejudgment interest in the amount of $10,912,291.05 (which represents interest through August 31, 1980) totalling $19,716,-236.55; plus prejudgment interest of $3,071.22 for each day thereafter up to and including the date of entry of this judgment.

"(ii) plus postjudgment interest 'from the date of entry of this judgment at the rate allowed by State law' as provided by 28 USC 1961.

"(iii) with costs." 199a.

On December 15, 1981, the Court of Appeals for the Third Circuit affirmed the District Court on all issues. 200a. As to non-bumper parts, its opinion stated that "The statute requires the award of a reasonable royalty, but to argue that this requirement exists even in the absence of any evidence from which a court may derive a reasonable royalty goes beyond the possible meaning of the statute. * * * Here, plaintiffs' proposed standard was vitiated by the facts, and there was insufficient evidence in the record upon which the fact finder could rely in formulating an alternative". 231a.

Petitioner filed a timely petition for certiorari. No. 82-1718. The sole question presented the same issue as the first question presented on the present petition, as shown below:

PRESENTED QUESTION
IN PRIOR PETITION 82-1718

"Where the Courts below have found continuous infringement of plaintiffs' patent by defendant, affecting over 1.3 billion non-bumper parts and resulting in savings to the defendant of over $60 million is it not error to award plaintiffs no compensation whatsoever for such infringement in light of the statutory mandate of 35 U.S.C. 284?"

PRESENTED QUESTION No. 1
CURRENT PETITION

"Where the statute (35 U.S.C. 284) explicitly provides that upon a finding of patent infringement, the court shall award 'no less than a reasonable royalty for the use made of the invention by

> the infringer' and where the lower courts found that the defendant infringed in the manufacture of 1.3 *billion* non-bumper parts, did the courts below commit reversible error of law in holding that the award of no royalty whatsoever complies with the statute? The holding of the Court of Appeals for the Third Circuit below is in direct conflict with decisions of the Federal Circuit and Sixth Circuit which hold that the 'literal terms of the statute set a reasonable royalty rate as the minimum below which an award of damages may not fall.'"

This Court denied Petitioner's petition for certiorari on May 24, 1982. 456 U.S. 990. GM's petition for certiorari was granted only on the issue of prejudgment interest. 456 U.S. 988.[2]

Petitioner then filed a motion in the Court of Appeals for the Third Circuit to send down its judgment, in lieu of formal mandate—

> ". . . (a) affirming the District Courts' judgment in the amount of $8,813,945.50, constituting the reasonable royalty award part of the Judgment, plus postjudgment interest thereon from October 6, 1980, the date of entry thereof, at the rate allowed by State law as provided by 28 U.S.C. 1961, and (b) postponing mandate as to the balance of the District Court's final judgment pending Supreme Court review of prejudgment interest."

30a. The motion was granted. 31a.

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[2] Questions 2 and 3 of GM's former Petition (81-1661), also sought review of the reasonable royalty judgment and the alleged infringements on which it was calculated. The Petition was denied as to these questions. If this Court should grant the present Technograph Petition on question number 1, GM asks that review also be granted on the merits of Questions 2 and 3 of GM's former Petition.

GM duly paid the judgment. On July 8, 1982, the District Court entered its Order, reading in part as follows:

> "1. The Clerk of this Court is directed to enter satisfaction of the reasonable royalty portion of the judgment entered on October 6, 1980 in this case against GM in the principal amount of $8,813,945.50
>
> "2. Post judgment interest at a rate to be determined will accrue on the satisfied judgment in this case against GM through, *but not after,* July 7, 1982" 35a (emphasis added)

On May 24, 1983, this Court affirmed the award of prejudgment interest. 242a (461 U.S. 648). GM forthwith paid the prejudgment interest award of $11,022,-854.97, and the District Court entered an order of satisfaction "of the pre-judgment interest portion of the judgment entered on October 6, 1980." 44a, 46a.

Thereafter, Petitioner filed a motion to declare the applicable postjudgment interest rate with respect to the satisfied judgment for reasonable royalties and prejudgment interest, totalling more than $19.8 million. Petitioner argued for a rate of 16 percent interest plus "delay damages", based on the Delaware State law. GM contended that the applicable rate under the Delaware law was 6 percent, and that "delay damages" should not be awarded since there had been no delay and compound interest was forbidden. On August 22, 1983, the District Court adopted the 16 percent postjudgment interest rate sought by Petitioner and awarded over $7 million in postjudgment interest. It refused to award "delay damages", since there had been no delay in satisfying the postjudgment interest and since compound interest was improper. 19a. Just eight days after the August 22, 1983 opinion, and be-

fore the order thereon, General Motors paid the full sum of $7,170,344.39 into court. 28a.

The Third Circuit concluded on appeal that interest on the postjudgment interest is not allowable. 11a. On this and all other points, the Court of Appeals affirmed the judgment below, stating:

> "We hold that the district court did not err in determining the rate of postjudgment interest to be 16%, in denying Devex interest on postjudgment interest, and in awarding plaintiffs interest on costs. Accordingly, the judgment of the district court will be affirmed." 13a.

A timely petition for rehearing *en banc* was denied on February 12, 1985. 49a.

SUMMARY OF ARGUMENT

This is the sixth petition for certiorari in this 29-year-old case on a patent which expired more than 15 years ago. The issues raised are no longer of public interest and are unworthy of attention by this Court. Further, as to Petitioner's question number 1, the petition is almost four years after the December 15, 1981 final judgment sought to be reviewed. Such judgment has not been reconsidered or altered in any way and has been satisfied. The petition is untimely, and this Court is without jurisdiction.

As to question number 2, the 1982 amendment to 28 U.S.C. 1961—applicable to all judgments entered after October 1, 1982 but not to this case—eliminates all reference to state laws and totally changes the statutory rule as to interest on postjudgment interest. Question number 2, therefore, involves only a private controversy on a now-dead issue under a statute which in its now-amended form resolves the issue.

I

QUESTION PRESENTED NO. 1

THE DAMAGES AMOUNT OF THE 1981 FINAL JUDGMENT

a. *The petition is untimely and this Court has no jurisdiction.* 28 USC 2101(c). The December 15, 1981 judgment of the Court of Appeals fixed a dollar amount of damages disposing of all questions as to the reasonable royalties. It is the final and only judgment dealing with reasonable royalties on any processes at issue, whether for bumper or non-bumper parts. Petitioners filed a timely petition for certiorari from that judgment. No. 82-1718. It was denied on May 24, 1982. 456 U.S. 990. The question presented on that petition was substantially identical with the first question on the present petition.

The judgment affirmed by the Court of Appeals on December 15, 1981 ordered GM to pay "$8,813,945.50 plus prejudgment interest in the amount of $10,912,-291.05 (which represents interest through August 31, 1980) totalling $19,716,236.55; plus prejudgment interest of $3,071.22 for each day thereafter up to and including the date of entry of this judgment". 199a. This order fixed the exact sum GM was required to pay up to the date of entry of the judgment. All issues as to reasonable royalties were resolved. The judgment as to these issues has long since been final.

The dollar judgment fixed the sum GM was required to pay, namely a reasonable royalty of $8,813,945.50, plus prejudgment interest. It also fixed what GM was *not* required to pay. It thus rejected all of Petitioner's demands for a greater sum in damages. In short, Petitioner was adjudged entitled to $8,813,945.50 as the

total reasonable royalty—no more and no less. The judgment finally concluded all issues as to the dollar amount of royalty damages. The question of reasonable royalties on non-bumper processes became a *non-issue* at that time—and it has continued to be a non-issue ever since.

The Court of Appeals judgment of December 3, 1984 does not reaffirm, modify, or even mention, the December 15, 1981 judgment. It is confined to wholly separate controversies on the amount of postjudgment interest and costs. These issues did not arise until at least July 1, 1982, well after this Court had denied certiorari on Petitioner's questions dealing with reasonable royalties. 38a. Further, no possible disposition of these subsequent controversies did, or even could, affect the previously settled reasonable royalty judgment, which was satisfied on July 8, 1982. 35a.

In *Federal Trade Commission* v. *Minneapolis-Honeywell,* 344 U.S. 206 (1952), this Court held that the 90 day period for petition for certiorari ran from the first of two judgments entered in that case by the court of appeals. The controlling point was that the second judgment did not affect the substance of the earlier judgment or entail any reconsideration of it. Likewise here. The October 6, 1980 District Court judgment requiring GM to pay specified sums (and no more) up to the date of judgment (199a), affirmed on December 15, 1981 (239a), has not been disturbed since it became final by this Court's denials of the petitions for certiorari and its affirmance of the award of prejudgment interest. Unlike *Minneapolis-Honeywell,* supra, the December 3, 1984 judgment here does not even refer to the earlier judgment, much less re-

state it. It does not and cannot disturb any part of the reasonable royalty dollar awards, settled over two years earlier. This Court's holding in *Toledo Scale Co.* v. *Computing Scale Co.*, 261 U.S. 399 (1923), is to the same effect. There, as here, a final decree of patent validity awarding damages had been entered by the Court of Appeals, and a later judgment was entered by that court on a subsequent controversy which could not and did not alter the damages judgment or involve any reconsideration of it. This Court held that the later decree did not start a new period for certiorari on the damages issue settled by the first judgment.

Petitioner cites *Hathorn* v. *Lovorn*, 457 U.S. 255, 262 and *Hughes Tool Co.* v. *Trans World Airlines, Inc.*, 409 U.S. 363, to the effect that denial of certiorari imparts no implication or inference concerning this Court's view on the merits. p. 4, fn. This argument misses the point. The question is not whether this Court's denial of the Petitioners' 1982 petition for certiorari resolved a contested issue now raised in the present 1985 petition. Rather, the controlling infirmity is jurisdictional—because the present petition was not filed within 90 days after the 1981 final judgment herein.

Petitioner would now have this court reassess the fact determination of the Special Master on non-bumper reasonable royalties. Petitioner devotes many pages of its petition to a one-sided and inaccurate statement of alleged facts, all of which were available and presented at the time of its first petition for certiorari in 1982. GM responded to these contentions some three years ago and pointed out that the petition misstated the facts, the fact findings of the master

were controlling and not clearly erroneous, and that Petitioner has the burden of proving the reasonable royalty. (GM Brief in Opposition, No. 81-1718.) This Court then considered the petition and response and after such consideration denied the petition on May 24, 1982. 456 U.S. 990. Now—five years after the Master's determination, and almost 4 years after the Court of Appeals affirmance, Petitioner seeks a new review of this previously settled old matter which would extend this case even longer than the 29 years that have passed since the case was filed.

b. *No issue of public importance is here present.* The Court of Appeals for the Federal Circuit now has exclusive jurisdiction to review district court judgments where jurisdiction rests in whole or in part on the patent laws. 28 USC 1295(a)(1), 1338. Whether the Court of Appeals for the Third Circuit was right or wrong in affirming the damages judgment, the decision is the last of its kind by that court. As such it has no continuing importance.

Petitioner argues that the 1981 judgment of the Third Circuit on non-bumper parts in this case "is in direct conflict with the Federal Circuit's holding" in *Stickle* v. *Heublein, Inc.*, 716 F.2d 1550, 1561 (1983). The two cases are entirely dissimilar on their facts, and there is no conflict in the holdings. But even if we assume that there is some resemblance and some conflict, the petition here should be denied because the Federal Circuit has already adopted the *Stickle* rule.

II

QUESTION PRESENTED NO. 2
INTEREST COMPOUNDING UNDER OLD 28 U.S.C. 1961

28 U.S.C. 1961, as applicable to the October 6, 1980 judgment in this case, provided that "interest shall be allowed on any money judgment in a civil case recovered in a District Court . . . Such interest shall be calculated from the date of entry of the judgment, at the rate allowed by State law." Following this statutory command, the October 6, 1980 District Court judgment herein states that there be "postjudgment interest from the entry of this judgment at the rate allowed by State law". 199a.

The then-applicable provisions of 28 U.S.C. 1961 have been totally replaced. Public Law 97-164. The new law, effective on October 1, 1982, provides that interest allowed on money judgments in civil cases is to be based on certain interest rates applicable to United States Treasury bills. The new law specifically provides that "Interest shall be computed daily . . . and shall be compounded annually."

The October 1, 1982 change is a substantially total rewrite of the statutory provision for calculation of interest on federal civil judgments. First, State law is completely eliminated as a criterion. Instead, a geographically uniform interest rate is made applicable to civil judgments as a matter of federal law. Second, the interest rate is based on the auction price of fifty-two week United States treasury bills, not whatever fixed or market-related interest rate a particular state applies. Third, interest on all judgments is computed on a daily basis, and compounded annually, instead of

whatever periods of computation and whatever rule as to compounding applies under the old law. These are fundamental changes—not just an amendment within the framework of the prior law. Virtually no decision this Court could make respecting the pre-1982 law can have any relevance to cases arising under the post-1982 statute.

This case illustrates the difference in the statutes. Following old 28 USC 1961, the District Court carefully reviewed the Delaware State law on postjudgment interest, including an amendment to the Delaware law effective on April 18, 1980. It resolved the question of whether the postjudgment interest rate under Delaware law is 6 percent or 16 percent in favor of the latter figure by distinguishing what until then had been an unbroken line of Delaware cases applying the 6 percent figure. 20a-23a. Similarly relying on Delaware state court decisions the Court of Appeals concluded that the District Court correctly interpreted the Delaware state law, and affirmed the 16 percent rate. 5a-7a. These inquiries would be totally irrelevant under 28 USC 1961 after the amendment effective October 1, 1982.

As to interest on postjudgment interest, the District Court here considered the Delaware law applicable. Citing a Federal District Court case interpreting the Delaware law, it concluded that under the Delaware law compounding of interest on postjudgment interest, or "delay damages" are not allowable. 25a. The Court of Appeals agreed with the District Court that compound interest is not allowable. 7a-12a. Again, the whole exercise is now academic. The Congress resolved all question of whether Federal law or State law applies on compounding postjudgment interest in new 28

USC 1961—along with the other fundamental changes discussed above.

Clearly, the massive changes in 28 U.S.C. 1961 effective on October 1, 1982—including the explicit provision for compounding of postjudgment interest calculated on a daily basis from the treasury bill auction prices—assure that the compound interest problem of Petitioner's second question will never occur again. Clearly, there is no substantial public purpose to be served by this Court resolving the issue for this singular case when the Congress has resolved the matter for all other cases.

While the lack of public interest in Petitioner's question number 2 should dictate denial, the ruling below is correct and, in accordance with Delaware law, as the District Court held. *Papendick* v. *Robert Bosch,* 562-CA-1977, slip op. at 4 (Del. Super. Ct., August 4, 1981), aff'd No. 238, 1981 (Del., March 11, 1982) (unreported opinion) and *Pack and Process, Inc.* v. *Nabisco, Inc.,* C.A. No. 78-285, Slip Op. at 6-7 (D. Del., September 18, 1981). If the federal law is deemed applicable, as the Third Circuit has ruled, Petitioners fare no better. As the opinion of that court states:

> "Although we decide this issue under federal rather than state law, we agree with the district court that allowing interest on the postjudgment interest would amount to the compounding of interest, which 'as a general rule, is not allowed to be computed on a debt.' *Cherokee Nation* v. *United States,* 170 U.S. 476, 490 (1925). *See also, Brooklyn Bank* v. *O'Neil,* 324 U.S. 697, 715 (1945). 11a.

Contrary to Petitioner's argument, postjudgment interest is not an unsatisfied judgment. As the Court of Appeals squarely held:

> "In the case at bar, however, the postjudgment interest cannot be considered an unsatisfied former judgment, because the amount of the judgment itself was in dispute until the Supreme Court decision in May 1983, and the rate of postjudgment interest was not fixed until August 1983". 11a.

Dorey v. *Dorey,* 609 F(2d) 1128 (5th Cir., 1980), Petition, page 20, is clearly inapplicable because it deals with normal postjudgment interest, not interest on the interest on judgments. And *National Bank* v. *Mechanics National Bank,* 94 U.S. 437 (1867), Petition, page 23, is likewise inapplicable because it, too, merely applied simple, not compound interest. To the same effect is, *Stewart* v. *Barnes,* 153 U.S. 465 (1893).

Finally, the record contradicts Petitioner's charges as to GM's delay and bad faith. The Master found as the fact that GM "acted in good faith and not recklessly". 106a. The Third Circuit found in its November 28, 1984 opinion that the "issues raised on appeal by General Motors regarding pre- and postjudgment interest were genuine and not dilatory, and there is no reason to punish General Motors for raising them". 10a. General Motors prevailed in the extensive validity trial in 1961. 105a. It again prevailed in the extensive infringement trial in 1969. Idem. The master noted that GM "merits a major share of the credit for the formulation of Appendix II of the pretrial order" and that it was "flexible, cooperative and forthcoming". 94a. Moreover, as each amount due for reasonable royalties, prejudgment interest, and postjudgment interest was settled, GM promptly paid the respective sums. 35a, 44a, 28a. It follows that Petitioner's arguments that delay in paying postjudgment

interest was attributable to General Motors' dilatory appeals is erroneous. Petition pp. 21-24.

CONCLUSION

The petition should be denied.

Respectfully submitted,

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Rule 28.1 listing appears in the Appendix to this brief.

APPENDIX

EXHIBIT 1

Pursuant to Supreme Court Rule 28.1, GM's non-wholly owned subsidiaries and affiliates are:

Aralmex, S.A. de C.V. (Mexico)

Automotriz Gencor S.A. (Ecuador)

Autos y Maquinas del Ecuador S.A. (AYMESA) (Ecuador)

Compania Nacional de Direcciones Automotrices, S.A. de C.V. (Mexico)

Compresores Delfa, C.A. (Venezuela)

Convesco Vehicle Sales GmbH (West Germany)

Daewoo Motor Co., Ltd. (Korea)

DHB—Componentes Automotivos S.A. (Brazil)

Fabrica Colombiana de Automotores S.A. ("Colomotores") (Columbia)

General Motors de Colombia S.A. (Columbia)

General Motors Egypt, S.A.E. (Egypt)

General Motors Iran Limited (Iran)

General Motors Kenya Limited (Kenya)

GM Allison Japan Limited (Japan)

GM Fanue Robotics Corp. (USA)

Industries Mecaniques Magbrebires, S.A. (Tunisa)

Industrija Delova Automobila, Kikinda (Yugoslavia)

Isuzu Motors Limited (Japan)

Isuzu Motors Overseas Distribution Corp. (Japan)

Kabelwerke Reinshagen GmbH (West Germany)

Kabelwerke Reinshagen Werk Berlin GmbH (West Germany)

Kabelwerke Reinshagen Werk Neumarkt GmbH (West Germany)

Moto Diesel Mexicana, S.A. de C.V. (Mexico)

Motor Enterprises, Inc. (USA)

New United Motor Manufacturing, Inc. (USA)

Omnibus BB Transportes, S.A. (Ecuador)

Promotora de Partes Electronicos Automotrices (Mexico)

P.T. Mesin Ksuzu Indonesia (Indonesia)

Senalizacion y Accesorios del Automovil Yorka, S.A. (Spain)

Suzuki Motor Co., Ltd. (Japan)

Unicables, S.A. (Spain)

Some of the processes accused as infringements in relation to question No. 1 were performed by GM using materials purchased under indemnity agreements with one or more of the following:

1. Amchem Products, Inc.
2. Bethlehem Steel Corporation
3. Braun Engineering Company
4. Colt Industries, Inc.
5. LTV Corporation
6. Occidental Petroleum Corporation
7. Pennwalt Corporation
8. Republic Steel Corporation
9. United States Steel Corporation